STATEMENT OF
AMERICAN INSURANCE ASSOCIATION[1]
AND
AMERICAN COUNCIL OF LIFE INSURERS[2]
BY
JACQUELINE T. LENMARK
RE: HOUSE BILL 283

Madam Chairman and members of the committee:

The American Insurance Association and the American Council of Life Insurers supports House Bill 283 and offers the following supplemental testimony to the committee as it was referred to written testimony from the Montana Commissioner of Insurance.

In this debate on the nongender requirements presently codified in Montana law, you have heard that the Montana Constitution mandates the present statutory provisions. Montana's Constitution contains the unique provision prohibiting both public and private discrimination "against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." Art. II, Sec. 4. Former Governor Schwinden, in fact, while acknowledging the detrimental impact of nongender insurance on women, in 1987 vetoed a bill to amend the present law on an equal protection basis. But equality is exactly what nongender insurance denies to women.

Insurance is a business that operates on the principle of matching a particular risk to a compensatory rate and premium. By requiring rates to be equal regardless of sex, we are requiring women in many instances to pay higher premiums for lower risk and ultimately subsidizing rates for men. The reverse, men subsidizing women, also sometimes occurs. That is not equality.

Equality means that you bear the responsibility or enjoy the benefit of the actual risk you

---

[1]AIA is a leading national trade association representing hundreds of property and casualty (P&C) insurers, many of whom do business in Montana. Members of AIA range in size from small companies to the largest insurers with global operations. On issues of importance to the P&C insurance industry and marketplace, AIA advocates sound public policies on behalf of its members in legislative and regulatory forums and routinely files *amicus curiae* briefs, comments and memoranda before courts.

[2]The ACLI represents 300 member companies operating in the United States. These 300 member companies account for 90 % of total assets in the United States. Two hundred sixty-five ACLI member companies do business in Montana, representing 92% of life insurance premiums and 94% of annuity considerations in the state. ACLI's public website can be accessed at www.acli.com.

present to the line of insurance you are purchasing. If, because as a class, you present a lower casualty risk you should be entitled to pay a lower premium. Likewise, if as a class you live a longer life than men, your life insurance premium should reflect that. But what we are requiring with nongender insurance is one class, women, who present demonstrably different risks, to subsidize the risk presented by another class. That is not equal protection and in fact denies women their property right in insurance without their constitutionality protected right to due process.

Two legal opinions have been written on this subject: one by Mr. Donald A. Garrity, a Helena attorney, and the other by Mr. Greg Petesch, the former director of legal services of the Legislative Council. (The opinions are included with this testimony.) Both concluded there was no such constitutional mandate.

Mr. Garrity's opinion is especially important to this issue. Mr. Garrity was hired specifically to provide a legal answer to the question "Does the individual dignities clause, Article II, Section 4, of the Montana Constitution mandate nongender treatment in insurance matters?" If the answer was "Yes," then it would be useless to mount a time-consuming campaign to repeal or amend Montana's nongender statute. Mr. Garrity was specifically instructed that he was not to write an advocacy brief on the insurance industry's behalf. Rather, he was to research the question and provide an opinion that would guide the industry and others in their decision whether to pursue repeal or amendment of the nongender law. Mr. Garrity concluded that the Montana Constitution permits sex-based classifications in insurance if there is a rational basis for such classification. *See* Mr. Garrity's Opinion at page 12.

Mr. Garrity's opinion was submitted to the Joint Interim Subcommittee No. 3 in 1984. Not content with his opinion, the subcommittee asked Mr. Petesch to determine (1) whether the enactment of the Unisex law was mandatory, and (2) whether the repeal of the Unisex law would make the practice of considering sex in insurance classifications unconstitutional. Again, Mr. Petesch, as Mr. Garrity, concluded that nongender classifications in insurance were not mandatory. Further, Mr. Petesch concluded that the use of sex in setting insurance rates would be permissible if the nongender law were repealed. *See* Mr. Petesch's opinion at pages 19, 26.

There is little doubt about the soundness of these two opinions. Additionally, Montana Supreme Court cases are clear. For example, in the case of In the Matter of the Will of Cram, the

decedent's will set up a trust for boys only. The Montana court found that Mr. Cram's scholarship trust indeed discriminated on the basis of sex, but that private discriminatory conduct was permitted. Decided in 1980, the case has not been overruled.

Another case of importance, and more recent than either Mr. Garrity's or Mr. Petesch's opinions, is Stone v. Belgrade School District No. 44, 217 Mont. 309, 703 P.2d 136 (1984). In that case, the Belgrade School District decided to hire a female counselor. The School District already employed a male counselor. Because female students had indicated that they would not counsel with a male counselor in some situations because of embarrassment or inhibitions, the School District decided it would not consider males for the position. The Plaintiff, Mr. Stone, was excluded from consideration for the position. The Montana court held that an employer could discriminate on the basis of sex when the reasonable demands of the position required sex discrimination. Our Supreme Court affirmed the district court, which had overruled the Human Rights Commission on the issue. That case has not been overruled.

Subsequent to the veto of the bill that would have amended Montana's prohibition of sex-based classifications, Mr. Ed Zimmerman, of the American Council of Life Insurers, reanalyzed case law from all states. Published in the Journal of Insurance Regulation, Mr. Zimmerman's opinions also concluded that the Montana Constitution, regardless of its unique individual dignities provision, did not mandate "unisex insurance." (Mr. Zimmerman's opinion is attached.)

There is another legal argument that follows something like this: proof of liability insurance when licensing and driving a motor vehicle is mandated by Montana law, therefore it is a constitutional or civil right that such insurance be made available without regard to sex-based classifications. The argument misses several important steps.

Although proof of liability insurance is required to license a vehicle, driving on the highways of this state is a revocable privilege, not a right. Because it is a privilege, no constitutional or civil rights flow from it and there is no civil right to obtain insurance. *See* State v. Skurdal, 235 Mont. 291, 767 P.2d 304, 307 (1986); cited in State v. Folda, 267 Mont. 523, 885 P.2d 426, 427 (1994); State ex rel Majerus v. Carter, 214 Mont. 272, 693 P.2d 501, 505 (1984).

I particularly direct your attention to the human rights statutes presently codified in Title 49. These statutes implement Article II, Section 4, of the Montana Constitution. Note that in every

situation in which discrimination is addressed by these statutes -- employment, public accommodations, housing, finance and credit transactions, education, and state action -- distinction based upon the reasonable demands of the position, upon bona fide occupational qualifications, or upon reasonable grounds are permitted. Only the statute pertaining to discrimination in insurance and retirement plans fails to contain such a qualification. It stands as an anomaly in our Code.

If the Montana Constitution mandates nongender insurance and permits no reasonable distinctions based on sex, as has been argued, then all discrimination laws which permit distinctions based upon reasonable demands, reasonable grounds, or occupational qualifications are unconstitutional. The cases discussed in the opinions by Mr. Garrity, Mr. Petesch, and Mr. Zimmerman demonstrate that this absurd conclusion simply is not the case.

Finally, I respectfully call to your attention that the only proper forum to finally determine the constitutionality of any given Montana statute is the Montana Supreme Court -- not the newspaper editor's office, not the Governor's office, nor even this body. It is the function of this body to set policy to benefit Montana's citizens. Former Governor Schwinden evaluated the veto of the nongender amendment in the 1987 session and carefully examined all of the financial and economic information on this issue. He was unable to say in his veto message what the proponents of unisex insurance hoped he would say: he could not say that unisex insurance benefits women. Former Governor Schwinden conceded:

> The evidence is clear and conclusive--statutory implementation of nongender insurance in 1985 has significantly increased the cost of insurance for many women.

I encourage you to allow women at all times both to bear the responsibilities and to enjoy the privileges of their sex in equality. On behalf of the insurance industry and those consumers of the industry who have been adversely affected by the nongender insurance requirement, I urge you to give this bill a do pass recommendation.

Submitted to House Business and Labor Committee on House Bill 283, February 2, 2011.

Respectfully submitted,

Jacqueline T. Lenmark

DONALD A. GARRITY
ATTORNEY AT LAW
[illegible]
HELENA, MONTANA 59601
[illegible]

To: Mr. Glenn Drake, Mr. Lester Loble, Mr. Bob James and Mr. Pat Melby

From: Donald A. Garrity

Subject: The Validity of Gender Based Insurance Classifications Under Article II, Section 4, of the Montana Constitution

Date: August 29, 1984

The 1983 Montana Legislature enacted legislation providing that: "It is an unlawful discriminatory practice for any financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments of benefits." Chapter 531, Laws of Montana, 1983, codified as Section 49-2-309, MCA.

The validity of this legislation is assumed. You wish to know if such a prohibition is mandated by the provisions of Article II, Section 4, of the Montana Constitution, which states: *

> **Individual Dignity.** The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the State nor any person, firm, corporation or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

(Emphasis supplied.)

This provision is unique among the sixteen State Constitutions which prohibit discrimination on the basis of sex in that it is the only one which explicitly prohibits such discrimination by individuals and private associations.[1] Similarly, the proposed Equal Rights Amendment to the Federal Constitution by its terms applies only to government.[2]

The language of the Montana Individual Dignity provision clearly seems to prohibit sexual discrimination by private persons and associations. But, as former California Chief Justice Traynor has said, "Plain words, like plain people, are not always as plain as they seem."[3] Our Supreme Court had the opportunity to construe the reach of Article II, Section 4, in 1980 when it construed the will of a sheep rancher which established a trust for payments to members of the Future Farmers of America or the 4-H Club who were boys between the ages of 14 and 18, Montana residents, and children of American born parents. In the Matter of the Will of Cram, 186 Mont. 37, 606 P.2d 145 (1980).

1 The other fifteen states are Alaska, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, New Hampshire, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington and Wyoming. The text of the various provisions is set forth in Annotation, Construction and Application of State Equal Rights Amendments Forbidding Determination of Rights Based on Sex, 90 A.L.R.3d, 164-65.

2 That proposed amendment reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.J.Res. 208, 92d Congress, 2d Session (1972).

3 Traynor, No Magic Words Could Do It Justice, 49 Cal. L. Rev. 615, 618 (1961).

A female member of the Future Farmers of America, who was of the age set by the trust, challenged its provisions as unconstitutionally discriminatory on the basis of sex. The Supreme Court held the trust did indeed discriminate on the basis of sex, but that private discriminatory conduct was not prohibited. Unfortunately, in its analysis the Court did not mention Montana's Constitutional provision but discussed only cases involving the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.* That clause has consistently been interpreted as prohibiting discrimination only when there is "State action." See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), in which it was held that a private club, even though licensed by the State to serve liquor, could refuse to serve blacks without violating the Equal Protection Clause.

In the many cases involving Article II, Section 4, which the Montana Supreme Court has decided since the adoption of Montana's 1972 Constitution, it has consistently used traditional Federal Equal Protection analysis, allowing discriminatory government action when it is based on a rational

* However, the briefs filed with the Court did argue Montana's Constitutional provision.

classification.[4] The only case other than the Cram will case which has squarely presented our Supreme Court with a question of sexual discrimination since the adoption of Article II, Section 4, is State v. Craig, 169 Mont. 150, 545 P.2d 649 (1975). There a male convicted of rape argued that the statute defining the offense violated this Section because it applied only to males having sexual intercourse without consent with females. The Court indicated that because historically and now "the vast majority" of sexual attacks have been by men upon women, the classification was reasonable.

Thus, it appears that the Montana Supreme Court, at least to date, has effectively read out the last sentence of Article II, Section 4, and confined its scope to the traditional equal protection of the laws. The committee report on this provision stated that it was intended to eradicate "public and private

4 See, e.g., McMillan v. McKee & Co., 166 Mont. 400, 533 P.2d 1095 (1975) (granting attorneys' fees to successful workers' compensation claimants but not to successful defending insurers does not violate equal protection); State v. Jack, 167 Nibt, 456, 539 P.2d 726 (1975) (requiring non-resident hunters to be accompanied by licensed guide invalid because not supported by rational basis); State v. Craig, 169 Mont. 150, 545 P.2d 649 (1976) (statute prohibiting sexual intercourse without consent only by males does not offend Article II, Section 4); State v. Gafford, 172 Mont. 380, 563 P.2d 1129 (1977) (statutory discrimination against ex-felons is reasonable and does not violate Montana's equal protection provisions); Emery v. State, 177 Mont. 73, 580 P.2d 445 (1978) (permissible to deny voting rights to inmates of state prison); McLansthan v. Smith, 186 Mont. 56, 606 P.2d 507 (1979) (difference in treatment of claimants with dependents under workers' compensation law valid because supported by a rational basis); Tipco Corporation v. City of Billings, ____ Mont. ____, 624 P.2d 1074 (1982) (city ordinance prohibiting residential solicitors but exempting local merchants invalid because not supported by rational basis); Oberg v. City of Billings, ____ Mont. ____, 674 P.2d 494 (1983) (statute prohibiting lie detector tests for employees except employees of public law enforcement agencies denies equal protection to law enforcement employees).

discriminations based on race, color, sex, culture, social origin or condition, or political or religious ideas."[5] It also noted that the proposed Federal Equal Rights Amendment "would not explicitly provide as much protection as this provision."[6] However, the committee report qualified the language somewhat by noting that it was not their intent that the prohibition against discrimination on the basis of political or religious ideas permit persons who supported the right to work in principle to avoid union membership.[7]

The Convention debate on this provision is more confusing. Delegate Habedank moved to delete the words "any person, firm, corporation, or institution," saying that he was a member of the Sons of Norway which, he feared, would not be able to limit its membership under this provision.[8]

Delegate Dahood responded that the section was only intended to cover discrimination in "matters that are public or matters that tend to be somewhat quasi-public. With respect to a religious organization, with respect to the Sons of Norway or the Sons of Scandinavia, of course, there would necessarily be qualifications that an individual would have to meet before he would be admitted to membership. That type of private organization is certainly not within the intendment of the

5 Proceedings of the Montana Constitutional Convention, Vol. II, P. 628.

6 Ibid.

7 Ibid.

8 Proceedings of the Montana Constitutional Convention, Vol. V., pp. 1642-43.

committee in submitting Section 4."[9] He also answered a question from another delegate concerning the right of women to join strictly men's organizations by saying, ". . . no, that is not our intent. There are certain requirements, certain qualifications, certain matters, I suppose, that might fall within the term of legitimate discrimination that are not covered by this particular section. Anything that falls within the realm of common sense--I think you've indicated situations where common sense would have to indicate that the qualifications that would be set for membership are proper, and in those circumstances I would not expect Section 4 to have any effect."[10]

The one exchange in the debate which seems to justify the Supreme Court's reading of this provision as a traditional equal protection clause is that between delegates Loendorf and Dahood. Loendorf stated: ". . . it's my understanding that . . . everything you have after the word 'equal protection of the law' would really be subsumed in that first provision and everything you've said after that would really be unnecessary . . . .." Dahood replied that Loendorf was correct but defended the additional wording as "the sermon that can be given by the Constitution, as well as the right, ..."[12]

9 Id. at 1643.

10 Id. at 1644.

11 Id. at 1643.

12 Ibid.

It was after this discussion that the motion to delete the words "any person, firm, corporation or institution" was defeated.[13]

Conceivably, it is this history which the Supreme Court has relied upon to interpret Article II, Section 4, as a simple equal protection clause not applicable to private persons and allowing discrimination based on reasonable classifications.

Had it chosen to fully articulate its reasons for so construing this section of our Constitution, the Montana Supreme Court might also have relied on the principle that a statute or a state constitutional provision must, if possible, be construed in such a manner as to uphold its constitutionality.[14] If Section 4 were literally interpreted, a religious body could not limit its priesthood or ministry to males, Democrats could not bar Republicans from participating in their caucuses, atheists would be entitled to participate in private religious services and the Sons of Norway, Daughters of the American Revolution, et al., would cease to exist as

13 Id. at 1645-46.

14 North Central Services, Inc., v. Hafdahl, ___ Mont. ___, 625 P.2d 56 (1981); Harrison v. City of Missoula, 146 Mont. 420, 407 P.2d 703 (1965); City of Philipsburg v. Porter, 121 Mont. 88, 190 P.2d 676 (1948). The same rules of construction apply to constitutional provisions as apply to statutes. Keller v. Smith, 170 Mont. 399, 553 P.2d 1002 (1976).

distinctive organizations. At least some of these results would clearly violate the United States Constitution.[15]

Another alternative rationale for our Supreme Court's interpretation of Section 4 would be a restrictive interpretation of the words "civil or political rights." In the debate on this section, it was stated that civil rights are "things that the Legislature has to deal with"[16] and that "at this time in American we [do not] have an all-inclusive definition of civil rights." [17]

Montana's Supreme Court has defined "right" as "any power or privilege vested in a person by law."[18] There are rights vested by the constitution, such as freedom of religion, due process, bail, trial by jury, and the right to vote, to name a few. Section 4 of Article II, like the Equal Protection Clause of the Federal Constitution, merely provides that the rights of all persons must rest upon the same rule under similar circumstances,[19] but it does not require things which are different in fact to be treated in law as though they were the same.[20]

15 See, e.g., Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) holding that churches are free to establish their own rules for internal government and the State may not interfere.

16 Proceedings of the Montana Constitutional Convention, Vol. V, P. 1644.

17 Ibid.

18 Waddell v. School District No. 3, 79 Mont. 432, 257 P. 278 (1927).

19 Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32 (1928).

20 Norvell v. Illinois, 373 U.S. 420 (1963).

As I stated at the outset of this paper, I assume Section 49-2-309, MCA, which prohibits different insurance rates based on sex, was within the power of the legislature to enact. But the differences in life expectancy between the sexes are real ones.[21] There is also apparently a real difference between the automobile accident records of young (under 25) male and female drivers, as well as between married persons under 25 and young single persons.[22] These differences constitute a rational basis for classification by sex and marital status and thus are not prohibiited by Article II, Section 4, of the Montana Constitution. Similarly, they would not offend the statutory prohibition against "unfair discrimination between individuals or risks of the same class" contained in Section 33-18-210, MCA.[23]

In summary, it is my opinion that Article II, Section 4, of the Montana Constitution applies only to "state action," not purely private discrimination, and that classifications based on sex are not prohibited thereby if there is a rational basis for such classifications. While I do not believe the

21 The average white male born in 1980 had a life expectancy of 70.7 years while the average white female born in that year had a life expectancy of 78.1 years. A white male who was 35 in 1980 had a life expectancy of an additional 38.6 years while a 35 year old white female could expect an additional 44.9 years of life. 1984 Statistical Abstract of the United States. See also: Note, Sex Discrimination and Sex Based Mortality Tables, 53 Boston University Law Review 624 (1973).

22 Florida Dep't of Insurance v. Insurance Services Office, 434 So.2d 908 (Fla. 1983); Insurance Services Office v. Commissioner of Insurance, 381 So.2d 515 (La. 1979).

23 Ibid.

regulation of insurance companies by the State converts their discriminatory acts into "state action,"[24] resolution of that question is unnecessary since the State itself is free to make such classifications on a rational basis.[25]

In answer to your question, it is my opinion that the provisions of Chapter 531, Laws of Montana, 1983, are not required by Article II, Section 4, of the Montana Constitution.

24 Life Insurance Co. of North America v. Reichardt, 591 F.2d 499 (9th Cir. 1979) and Murphy v. Harleysville Mutual Insurance Co., 282 Pa. Super. 244, 422 A.2d 1097 (1981) so hold.

25 As an employer subject to the Federal Equal Employment Opportunities Act, Montana may not discriminate in the terms of pension plans for its employees on the basis of sex, in spite of the difference in longevity between men and women. 42 U.S.C. §2000e-2; Los Angeles Dep't. of Water and Power v. Manhart, 435 U.S. 702 (1978); Arizona Governing Committee v. Norris, ____ U.S. ____, 77 L.Ed.2d 1236, 103 S. Ct. 3492 (1983).

Montana Legislative Council

State Capitol
Helena, MT. 59620

(406) 444-3064

October 29, 1984

TO: Joint Interim Subcommittee No. 3

FROM: Greg Petesch, Staff Attorney GP

RE: Gender-Based Insurance Classifications

Section 49-2-309, MCA, enacted by Chapter 531, Laws of 1983, provides:

> 49-2-309. Discrimination in insurance and retirement plans. (1) It is an unlawful discriminatory practice for any financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments or benefits.
>
> (2) This section does not apply to any insurance policy, plan, coverage, or any pension or retirement plan, program, or coverage in effect prior to October 1, 1985.

You have asked me to investigate two issues: (1) whether enactment of this legislation was mandatory in light of Article II, section 4, of the Montana Constitution; and (2) whether repeal of this legislation would make the current practice of

considering gender in insurance classifications unconstitutional.

Article II, section 4, of the Montana Constitution provides:

> Section 4. Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Montana's is the only equal rights amendment which specifically prohibits discrimination by any person, firm, corporation, or institution, i.e., private discrimination.[1]

The Bill of Rights Committee of the Constitutional Convention stated in its committee report the following:

COMMENTS

> The committee unanimously adopted this section with the intent of providing a Constitutional impetus for the eradication of public and private discriminations based on race, color, sex, culture, social origin or condition, or political or religious ideas. The provision, quite similar to that of the Puerto Rico declaration of rights is aimed at prohibiting private as well as public discriminations in civil and political rights.

---

[1]Construction and Application of State Equal Rights Amendments Forbidding Determination of Rights Based on Sex, 90 A.L.R. 3d, 164-65.

Considerable testimony was heard concerning the need to include sex in any equal protection or freedom from discrimination provisions. The committee felt that such inclusion was eminently proper and saw no reason for the state to wait for the adoption of the federal Equal Rights Amendment, an amendment which would not explicitly provide as much protection as this provision.

The word culture was incorporated specifically to cover groups whose cultural base is distinct from mainstream Montana, especially the American Indians. "Social origin or condition" was included to cover discriminations based on status of income and standard of living.

Some fears were expressed that the wording "political or religious ideas" would permit persons who supported right to work in principle to avoid union membership. Such is certainly not the intent of the committee. The wording was incorporated to prohibit public and private concerns discriminating against persons because of their political or religious beliefs.

The wording of this section was derived almost verbatim from Delegate Proposal No. 61. The committee felt that this proposal incorporated all the features of all the Delegate Proposals (No.'s 10, 32, 50 and 51) on the subjects of equal protection of the laws and the freedom from discrimination. The committee is well aware that any broad proposal on these subjects will recuire considerable statutory embellishment. It is hoped that the legislature will enact statutes to promote effective eradication of the discriminations prohibited by this section. The considerable support for and lack of opposition to this provision indicates its import and advisability.[2] (emphasis supplied)

---

[2]Proceedings of the Montana Constitutional Convention, Vol. II, P. 628.

As pointed out by Mr. Garrity, the convention debate on Article II, section 4, is confusing.[3] Delegate Harper did ask, "Aren't civil rights things that the Legislature has to deal with?"[4] Delegate Dahood responded that basically that was correct.[5] At the time the Constitution was adopted, section 64-301, R.C.M. 1947, provided:

> 64-301. Freedom from discrimination as civil right -- employment -- public accommodations. The right to be free from discrimination because of race, creed, color, sex, or national origin is recognized as and declared to be a civil right. This right shall include, but not be limited to:
>
> (1) The right to obtain and hold employment without discrimination.
>
> (2) The right to the full enjoyment of any of the accommodation facilities or privileges of any place of public resort, accommodation, assemblage or amusement.

That section is now codified as 49-1-102, MCA.

This section points out that the issue of sex discrimination was addressed by the Legislature even prior to the adoption of Article II, section 4.

With this background, it appears that the Constitutional Convention delegates intended that the Legislature embellish Article II, section 4, with statutory enactments. The question presented, however,

---

[3]Garrity, PP. 5-6; Proceedings of the Montana Constitutional Convention, Vol. V, pp. 1642-1646.

[4]Ibid., p. 1644.

[5]Ibid.

is whether the Legislature is required to enact legislation regarding this area.

It has long been recognized that the Constitution does not grant power to the Legislature but merely limits the Legislature's exercise of its power. In St. ex rel. DuFresne v. Leslie, 100 M 449, 453, 50 P.2d 959 (1935), the Montana Supreme Court stated:

> It is very clear that, except for the limitations placed upon the power of the legislature, first by the Constitution of the United States, and second by the Constitution of the state, the will of the legislative body may be freely exercised in all legislative matters unrestricted.[6]

It is inherent in the concept of the separation of powers provision of the state Constitution, Article III, section 1, that if a power is reposed in one department, the other two may not encroach upon or exercise that power, except as expressly directed or permitted in the Constitution. Mills v. Porter, 69 M 325, 222 P. 428 (1924). The courts have no power to compel the Legislature to pass an act, even though the Constitution expressly commands it, nor restrain it from passing an act, even though the Constitution expressly forbids it.[7]

---

[6]See also Board of Regents v. Judge, 168 M 433, 543 P.2d 1323 (1975); Hilger v. Moore, 56 M 146, 182 P. 477 (1919); St. ex rel. Evans v. Stewart, 53 M 18, 161 P. 309 (1916); and St. ex rel. Toi v. French, 17 M 54 (1895).

[7]See cases cited in Annotation, Power and duty of court where legislature renders constitutional mandate ineffectual by failing to enact statute necessary to make it effective or by repealing or amending statute previously passed for that purpose, 153 A.L.R. 522-528.

> The lawmaking body may or may not, as it chooses, pass laws putting into effect a constitutional provision, and if, in its efforts to give effect to a constitutional provision, the statute is not broad and comprehensive enough to cover all subjects that it might, we know of no reason why it should not be valid as far as it goes.[8]

It is apparent that the Legislature is never required to enact a statute or particular piece of legislation. Therefore, in answer to the first question presented, the enactment of Chapter 531, Laws of 1983, was not mandatory. I am unaware of any method of compelling a legislative enactment, other than that used to gain passage of Chapters 2 and 3, Ex. Laws of 1903.

49-2-309

The second question presented is whether the repeal of Chapter 531, Laws of 1983, would render the use of gender in classifying individuals for insurance purposes unconstitutional.

The courts generally recognize the power of the Legislature to repeal a statute enacted in compliance with a provision of the Constitution even where the Constitution makes it the duty of the Legislature to enact such a law to effectuate the constitutional provision, and the repealer would result in frustrating the purpose evidenced by the Constitution.[9]

If the framers of the Constitution do not feel that the Legislature will carry out a constitutional mandate,

---

[8] Arizona Eastern R. Co. v. Matthews, 180 P. 159 (Az. 1919).

[9] See Myers v. English, 9 Cal. 342 (1858) and 153 A.L.R. supra at 525.

they may make the constitutional provision self-executing. As stated in St. ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 74, 132 P.2d 689 (1942):

> A provision is self-executing when it can be given effect without the aid of legislation and there is nothing to indicate that legislation is contemplated in order to render it operative; * * * constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.

The court went on to point out that the test for determining whether a provision is self-executing is whether it is directed to the courts or the Legislature.

During the debate on Article II, section 4, Delegate Robinson asked whether the provision would be nonself-executing and would require complete legislative implementation to make it effective. Delegate Dahood responded that in his judgment that was not true.[10] But also note that the committee report states that "The committee is well aware that any broad proposal on these subjects will require considerable statutory embellishment."[11] Unfortunately, conflicting conclusions as to the self-executing nature of Article II, section 4, can be reached from these remarks.

In Keller v. Smith, 170 M 399, 409, 553 P.2d 1002 (1976), the Supreme Court stated that " . . . the

---

[10] Transcripts, supra at 1644-1645.

[11] Supra, Note 2.

collective intent of the delegates can best be determined by application of the preceding rules of construction [i.e., general rules of statutory construction] to the ambiguous language used". The court pointed out that it had specifically refrained from using the Convention proceedings to determine intent as they could be used to support either position.

The problem then becomes one of predicting how the Montana Supreme Court would interpret a case brought challenging the use of gender classifications in setting insurance rates. As pointed out by Mr. Garrity, a challenge based on private sex discrimination under the alleged reach of Article II, section 4, was brought before the court in In the Matter of the Will of Cram, 186 M 37, 606 P.2d 145 (1980). The court did not mention Article II, section 4, but upheld the private discriminatory trust based upon a lack of "state action". The requirement of "state action" for discrimination to be prohibited is taken from cases interpreting the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[12]

The Montana Supreme Court has consistently applied federal Equal Protection analysis to cases involving Article II, section 4.

---

[12]See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), wherein it is stated that "where the impetus for discrimination is private, the State must have 'significantly involved itself with invidious discriminations', in order for the discriminatory action to fall within the ambit of the constitutional prohibition".

Federal analysis, at least in the areas of economic and social legislation, allows governmental classification when it has a rational basis, i.e., it is not arbitrary.[13] The federal analysis applies a "strict scrutiny" test to so-called suspect classifications such as race.[14] In those areas a state must show a "compelling interest" in the classification.[15] The U.S. Supreme Court has recently adopted a so-called "middle test" in areas involving gender classifications. In Mississippi University for Women v. Hogan, 458 U.S. 710, 724 (1982), the court said:

> The party seeking to uphold a statute that classifies individuals on the basis of gender must carry the "exceedingly pursuasive justification" for the classification. The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related" to the achievement of those objectives.[16]

---

[13] See Royster Guano Co. v. Virginia, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920). This test was applied in St. v. Craig, 169 M 150, 545 P.2d 649 (1975).

[14] Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817 (1967).

[15] See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 36 L.Ed.2d 16, 93 S.Ct. 1278, reh. den., 411 U.S. 959 (1973). This strict scrutiny test requiring the showing of a compelling state interest was applied in White v. St., ____ M ____, 661 P.2d 495 (1983).

[16] This middle test was first articulated in Craig v. Boren, 429 U.S. 190 (1976), involving an Oklahoma statute providing differing legal drinking ages for males and females. The U.S. Supreme Court struck down the law saying the state was using maleness as a proxy for the regulation of drinking and driving. A quote from this case that may be of particular interest to this committee is found on page 204. "It is

The Montana Supreme Court has only been squarely presented with two sexual discrimination cases: Cram, involving private discrimination, and St. v. Craig, 169 M 150, 545 P.2d 649 (1975), where the court held that there was a rational basis for classifying by sex under the sexual intercourse without consent statute. In a case involving a dissolution of marriage, Vance v. Vance, ____ M ____, 664 P.2d 907, 40 St.Rep. 836 (1983), the court stated that the trial court's recognition of the present relative economic status of men and women with respect to income earning potential and the distribution of marital assets accordingly did not violate a former husband's constitutional right of equal protection.

It is interesting to note that Article II, section 4, has been referred to in an Alaska decision. In U.S. Jaycees v. Richardet, 666 P.2d 1008 (Alaska 1983), Richardet argued that the prohibition against sex discrimination in Article I, section 3, of the Alaska Constitution, was in effect as broad as Montana's Article II, section 4, which explicitly prohibits both private and governmental discrimination, because the Alaska Human Rights legislation implementing the Constitution prohibits private as well as public discrimination. The Alaska Supreme Court stated in note 15, "However, the Legislature's construction of a

---

16 (continued) unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause."

constitutional provision is, of course, not binding upon this court." The court went on to hold that "state action" is a necessary predicate to application of the Equal Protection Clause of the Alaska Constitution.[17]

The case closest to the situation under consideration here is Murphy v. Harleysville Mutual Insurance Co., 422 A.2d 1097 (Pa. super. 1980), wherein a class action was brought on behalf of three groups that had purchased automobile insurance from the defendant: (1) all males; (2) all unmarried persons; and (3) all persons under 30 years of age. The plaintiff alleged that the premiums charged constituted a violation of the Pennsylvania ERA as to the first group and the federal Equal Protection Clause as to the other two groups. The Pennsylvania court found no state action as to the alleged federal violations. In its discussion of the alleged state ERA violation, the court quoted extensively from Lincoln v. Mid-Cities Pee Wee Football Assoc., 576 S.W.2d 922 (Tex. Ct. App. 1979), a case involving a girl's attempt to be allowed to participate in a private nonprofit corporation's all-male youth football league. Both states' ERAs prohibit discrimination "under the law". Both courts held that "state action or private conduct that is

---

[17]This case was decided prior to Roberts v. U.S. Jaycees, 52 L.W. 5076 (1984), where the U.S. Supreme Court held that under Minnesota's Human Rights Act, Ms. Roberts could not be excluded from membership in the organization. The court stated, "Assuring women equal access to the goods, privileges, and advantages of a place of public accommodation clearly furthers compelling state interests." (emphasis supplied)

encouraged by, enabled by, or closely interrelated in function with state action"[18] is required before a discriminatory practice is prohibited.

The courts stated: "Had the amendment been intended to proscribe private conduct, we believe this proscription could and would have been clearly expressed to apply to all discrimination, public and private."[19] Following Murphy, the Pennsylvania Insurance Commissioner used the ERA as an aid in interpreting his powers and duties under the Rate Act 40 P.L. §§1181-1199, to disapprove the use of sex as a classification basis for automobile insurance rate differentials. The Commissioner's decision was upheld in Hartford Accident and Indemnity Co. v. Insurance Commissioner of Pennsylvania, 442 A.2d 382 (Pa. Comwlth. 1982), where the court held that the Commissioner did not exceed his statutory authority. The Commissioner's action was recently upheld by the Pensylvania Supreme Court.[20]

In light of these cases, it appears that if the Montana Supreme Court could be persuaded to follow the rationale regarding private discrimination referred to in the Texas and Pennsylvania decisions, the use of gender as a classification factor in setting insurance rates could be held unconstitutional if Chapter 531, Laws of 1983, were repealed.[21] However, so long as the

---

[18]Murphy at 1103.

[19]Ibid.

[20]Hartford Accident & Indemnity Co. v. Insurance Commissioner, Docket No. J-76-1984, (Pa. Sup. Ct. 1984).

[21]This seems unlikely in light of the recently decided In the Matter of C.H., ____ M ____, 683 P.2d 931, 41 St.Rep. 997, 1005 (1984), where the court stated, "The Fourteenth Amendment of the United States

court applies traditional federal Equal Protection analysis to claims of alleged private discrimination, there would be no "state action", and the use of gender in setting insurance rates would be permissible if Chapter 531, Laws of 1983, were repealed.[22]

21(continued) Constitution and Article II, section 4, of the 1972 Montana Constitution guaranty [sic] equal protection of the laws to all persons. The equal protection provisions of the federal and state constitutions are similar and provide generally equivalent but independent protections." Citing Emery v. St., 177 M 73, 580 P.2d 445, cert. den., 439 U.S. 874, 99 S.Ct. 210, 58 L.Ed.2d 187 (1978). The court goes on to explain when it applies the various tests to the type of classification involved.

[22]See Note 20, but the court could address a gender classification under Article II, section 4, in the recently argued case of Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry, No. 84-172.

GP1EE/hm/Gender-Based Insurance

History: En. 64-313 by Sec. 11, Ch. 524, L. 1975; R.C.M. 1947, 64-313.

49-2-204. Commission to adopt rules. The commission shall adopt procedural and substantive rules necessary to implement this chapter. Rulemaking procedures shall comply with the requirements of the Montana Administrative Procedure Act.

History: En. 64-315 by Sec. 13, Ch. 524, L. 1975; R.C.M. 1947, 64-315.

Cross-References

Montana Administrative Procedure Act, Title 2, ch. 4.

Part 3
Prohibited Discriminatory Practices

Part Cross-References

Price discrimination, Title 30, ch. 14, part 9.

Unfair discrimination prohibited — life insurance, annuities, and disability insurance, 33-18-206.

No discrimination based on evaluation or treatment relating to mental illness, 53-21-189.

49-2-301. Retaliation prohibited. It is an unlawful discriminatory practice for a person, educational institution, financial institution, or governmental entity or agency to discharge, expel, blacklist, or otherwise discriminate against an individual because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter.

History: Ap.p. Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; Sec. 64-306, R.C.M. 1947; Ap.p. Sec. 9, Ch. 283, L. 1974; amd. Sec. 10, Ch. 524, L. 1975; Sec. 64-312, R.C.M. 1947; R.C.M. 1947, 64-306(9), 64-312(2); amd. Sec. 4, Ch. 177, L. 1979.

49-2-302. Aiding, coercing, or attempting. It is unlawful for a person, educational institution, financial institution, or governmental entity or agency to aid, abet, incite, compel, or coerce the doing of an act forbidden under this chapter or to attempt to do so.

History: En. 64-312 by Sec. 9, Ch. 283, L. 1974; amd. Sec. 10, Ch. 524, L. 1975; R.C.M. 1947, 64-312(1); amd. Sec. 5, Ch. 177, L. 1979.

Cross-References

When accountability exists, 45-2-302.

Inchoate offenses, Title 45, ch. 4.

49-2-303. Discrimination in employment. (1) It is an unlawful discriminatory practice for:

(a) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction;

(b) a labor organization or joint labor management committee controlling apprenticeship to exclude or expel any person from its membership or from an apprenticeship or training program or to discriminate in any way against a member of or an applicant to the labor organization or an employer or

employee because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the program do not require an age, physical or mental disability, marital status, or sex distinction;

(c) an employer or employment agency to print or circulate or cause to be printed or circulated a statement, advertisement, or publication or to use an employment application that expresses, directly or indirectly, a limitation, specification, or discrimination as to sex, marital status, age, physical or mental disability, race, creed, religion, color, or national origin or an intent to make the limitation, unless based upon a bona fide occupational qualification;

(d) an employment agency to fail or refuse to refer for employment, to classify, or otherwise to discriminate against any individual because of sex, marital status, age, physical or mental disability, race, creed, religion, color, or national origin, unless based upon a bona fide occupational qualification.

(2) The exceptions permitted in subsection (1) based on bona fide occupational qualifications must be strictly construed.

(3) Compliance with 2-2-302 and 2-2-303, which prohibit nepotism in public agencies, may not be construed as a violation of this section.

(4) The application of a hiring preference as provided for in 2-18-111 and 18-1-110 may not be construed to be a violation of this section.

(5) It is not a violation of the prohibition against marital status discrimination in this section for an employer or labor organization to provide greater or additional contributions to a bona fide group insurance plan for employees with dependents than to those employees without dependents or with fewer dependents.

History: En. 64-306 by Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; R.C.M. 1947, 64-306(1), (2); amd. Sec. 1, Ch. 279, L. 1983; amd. Sec. 1, Ch. 342, L. 1985; amd. Sec. 3, Ch. 506, L. 1991; amd. Sec. 3, Ch. 13, L. 1993; amd. Sec. 3, Ch. 407, L. 1993.

Compiler's Comments

1993 Amendments: Chapter 13 inserted (5) to clarify that providing greater or additional contributions to a bona fide group insurance plan for employees with dependents does not constitute discrimination based on marital status; and made minor changes in style. Amendment effective February 1, 1993.

Chapter 407 throughout section substituted "disability" for "handicap"; and made minor changes in style.

Cross-References

Work-study program, 20-25-707.

Equal pay for women for equivalent service, 39-3-104.

Exclusion of handicapped from minimum wage and overtime compensation laws, 39-3-406.

Women in employment, Title 39, ch. 7.

Exemption from association with labor organization on religious grounds, 39-31-204.

Right to refuse to participate in sterilization, Title 50, ch. 5, part 5.

Right to refuse to participate in abortion, 50-20-111.

49-2-304. Discrimination in public accommodations. (1) Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner, lessee, manager, agent, or employee of a public accommodation:

(a) to refuse, withhold from, or deny to a person any of its services, goods, facilities, advantages, or privileges because of sex, marital status, race, age, physical or mental disability, creed, religion, color, or national origin;

(b) to publish, circulate, issue, display, post, or mail a written or printed communication, notice, or advertisement which states or implies that any of the services, goods, facilities, advantages, or privileges of the public accommodation will be refused, withheld from, or denied to a person of a certain race, creed, religion, sex, marital status, age, physical or mental disability, color, or national origin.

(2) Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for a licensee under Title 16, chapter 4, to exclude from its membership or from its services, goods, facilities, advantages, privileges, or accommodations any individual on the grounds of race, color, religion, creed, sex, marital status, age, physical or mental disability, or national origin. This subsection does not apply to any lodge of a recognized national fraternal organization.

(3) Nothing in this section prohibits public accommodations from giving or providing special benefits, incentives, discounts, or promotions for the benefit of individuals based on age.

History: En. 64-306 by Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; R.C.M. 1947, 64-306(3); amd. Sec. 1, Ch. 3, L. 1989; amd. Sec. 2, Ch. 543, L. 1989; amd. Sec. 1, Ch. 454, L. 1991; amd. Sec. 4, Ch. 407, L. 1993.

Compiler's Comments

1993 Amendment: Chapter 407 throughout section substituted "disability" for "handicap".

Cross-References

Health care facilities, 50-5-105.

Furnishing of medical assistance, 53-6-105.

Opportunity for religious observance in facilities for developmentally disabled, 53-20-142.

Opportunity for religious observance in mental health facilities, 53-21-142.

49-2-305. Discrimination in housing — exemptions. (1) It is an unlawful discriminatory practice for the owner, lessee, or manager having the right to sell, lease, or rent a housing accommodation or improved or unimproved property or for any other person:

(a) to refuse to sell, lease, or rent the housing accommodation or property to a person because of sex, marital status, race, creed, religion, color, age, familial status, physical or mental disability, or national origin;

(b) to discriminate against a person because of sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin in a term, condition, or privilege relating to the use, sale, lease, or rental of the housing accommodation or property;

(c) to make an inquiry of the sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin of a person seeking to buy, lease, or rent a housing accommodation or property for the purpose of discriminating on the basis of sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin;

(d) to refuse to negotiate for a sale or to otherwise make unavailable or deny a housing accommodation or property because of sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin;

(e) to represent to a person that a housing accommodation or property is not available for inspection, sale, or rental because of that person's sex,

marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin when the housing accommodation or property is in fact available; or

(f) for profit, to induce or attempt to induce a person to sell or rent a housing accommodation or property by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin.

(2) The rental of sleeping rooms in a private residence designed for single-family occupancy in which the owner also resides is excluded from the provisions of subsection (1), provided that the owner rents no more than three sleeping rooms within the residence.

(3) It is an unlawful discriminatory practice to make, print, or publish or cause to be made, printed, or published any notice, statement, or advertisement that indicates any preference, limitation, or discrimination that is prohibited by subsection (1) or any intention to make or have a prohibited preference, limitation, or discrimination.

(4) It is an unlawful discriminatory practice for a person to discriminate because of a physical or mental disability of a buyer, lessee, or renter; a person residing in or intending to reside in or on the housing accommodation or property after it is sold, leased, rented, or made available; or any person associated with that buyer, lessee, or renter:

(a) in the sale, rental, or availability of the housing accommodation or property;

(b) in the terms, conditions, or privileges of a sale or rental of the housing accommodation or property; or

(c) in the provision of services or facilities in connection with the housing accommodation or property.

(5) For purposes of subsections (1) and (4), discrimination because of physical or mental disability includes:

(a) refusal to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by the person with a disability if the modifications may be necessary to allow the person full enjoyment of the premises, except that in the case of a lease or rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the lessor's or renter's agreement to restore the interior of the premises to the condition that existed before the modification, except for reasonable wear and tear;

(b) refusal to make reasonable accommodations in rules, policies, practices, or services when the accommodations may be necessary to allow the person equal opportunity to use and enjoy a housing accommodation or property; or

(c) (i) except as provided in subsection (5)(c)(ii), in connection with the design and construction of a covered multifamily housing accommodation, a failure to design and construct the housing accommodation in a manner that:

(A) provides at least one accessible building entrance on an accessible route;

(B) makes the public use and common use portions of the housing accommodation readily accessible to and usable by a person with a disability;

(C) provides that all doors designed to allow passage into and within all premises within the housing accommodation are sufficiently wide to allow passage by a person with a disability who uses a wheelchair; and

(D) ensures that all premises within the housing accommodation contain the following features of adaptive design:

(I) an accessible route into and through the housing accommodation;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms that allow an individual who uses a wheelchair to maneuver about the space;

(ii) a covered multifamily housing accommodation that does not have at least one building entrance on an accessible route because it is impractical to do so due to the terrain or unusual characteristics of the site is not required to comply with the requirements of subsection (5)(c)(i).

(6) For purposes of subsection (5), the term "covered multifamily housing accommodation" means:

(a) a building consisting of four or more dwelling units if the building has one or more elevators; and

(b) ground floor units in a building consisting of four or more dwelling units.

(7) (a) It is an unlawful discriminatory practice for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate because of sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin against a person in making available a transaction or in the terms or conditions of a transaction.

(b) For purposes of this subsection (7), the term "residential real estate-related transaction" means any of the following:

(i) the making or purchasing of loans or providing other financial assistance:

(A) for purchasing, constructing, improving, repairing, or maintaining a housing accommodation or property; or

(B) secured by residential real estate; or

(ii) the selling, brokering, or appraising of residential real property.

(8) It is an unlawful discriminatory practice to deny a person access to or membership or participation in a multiple-listing service; real estate brokers' organization; or other service, organization, or facility relating to the business of selling, leasing, or renting housing accommodations or property or to discriminate against the person in the terms or conditions of access, membership, or participation because of sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin.

(9) It is an unlawful discriminatory practice to coerce, intimidate, threaten, or interfere with a person in the exercise or enjoyment of or because of the person having exercised or enjoyed or having aided or encouraged any

right granted or protected by

discrimination because of age
or older persons. "Housing for

ram specifically designed and

rsons 62 years of age or older;

y at least one person 55 years
the provisions of 42 U.S.C.
those sections read on October

inst discrimination because of
r units in dwellings containing
ccupied by no more than two
the owner actually maintains
owner's residence.
status" means having a child
A distinction based on familial
a child or children who live or

amd. Sec. 2, Ch. 121, L. 1975; amd.
R.C.M. 1947, 64-306(4); amd. Sec. 6,
Sec. 1, Ch. 503, L. 1989; amd. Sec. 1,
Sec. 1, Ch. 801, L. 1991; amd. Sec. 5,

(1)(c), (7)(a), and (8) inserted "marital
and made minor changes in style.

References
oan renewal, 7-15-4207.

and credit transactions. (1)
r a financial institution, upon
ance, to permit an official or
s duties, to discriminate against
ce, creed, religion, age, physical
n a term, condition, or privilege
titution's financial assistance,

ce for a creditor to discriminate
national origin, age, mental or
ainst any person in any credit
of any state or federal court of

amd. Sec. 2, Ch. 121, L. 1975; amd.
R.C.M. 1947, 64-306(5), (8); amd. Sec.

Compiler's Comments
1993 Amendment: Chapter 407 throughout section substituted "disability" for "handicap"; and made minor changes in style.

Cross-References
State District Court jurisdiction, Title 3, ch. 5, part 3.
Municipal Court jurisdiction, 3-6-103.
Power to contract, Title 28, ch. 2, part 2.
No discrimination by certain insurers, 33-18-210.
Medical and health insurance — continuation of coverage for handicapped child, 33-22-304, 33-22-506, 33-30-1003, 33-30-1004.
Minors' power to contract, Title 41, ch. 1, part 3.

49-2-307. Discrimination in education. It is an unlawful discriminatory practice for an educational institution:

(1) to exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, or privileges of the institution because of race, creed, religion, sex, marital status, color, age, physical disability, or national origin or because of mental disability, unless based on reasonable grounds;

(2) to make or use a written or oral inquiry or form of application for admission that elicits or attempts to elicit information or to make or keep a record concerning the race, color, sex, marital status, age, creed, religion, physical or mental disability, or national origin of an applicant for admission, except as permitted by regulations of the commission;

(3) to print, publish, or cause to be printed or published a catalog or other notice or advertisement indicating a limitation, specification, or discrimination based on the race, color, creed, religion, age, physical or mental disability, sex, marital status, or national origin of an applicant for admission; or

(4) to announce or follow a policy of denial or limitation of educational opportunities of a group or its members, through a quota or otherwise, because of race, color, sex, marital status, age, creed, religion, physical or mental disability, or national origin.

History: En. 64-306 by Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; R.C.M. 1947, 64-306(7); amd. Sec. 7, Ch. 407, L. 1993.

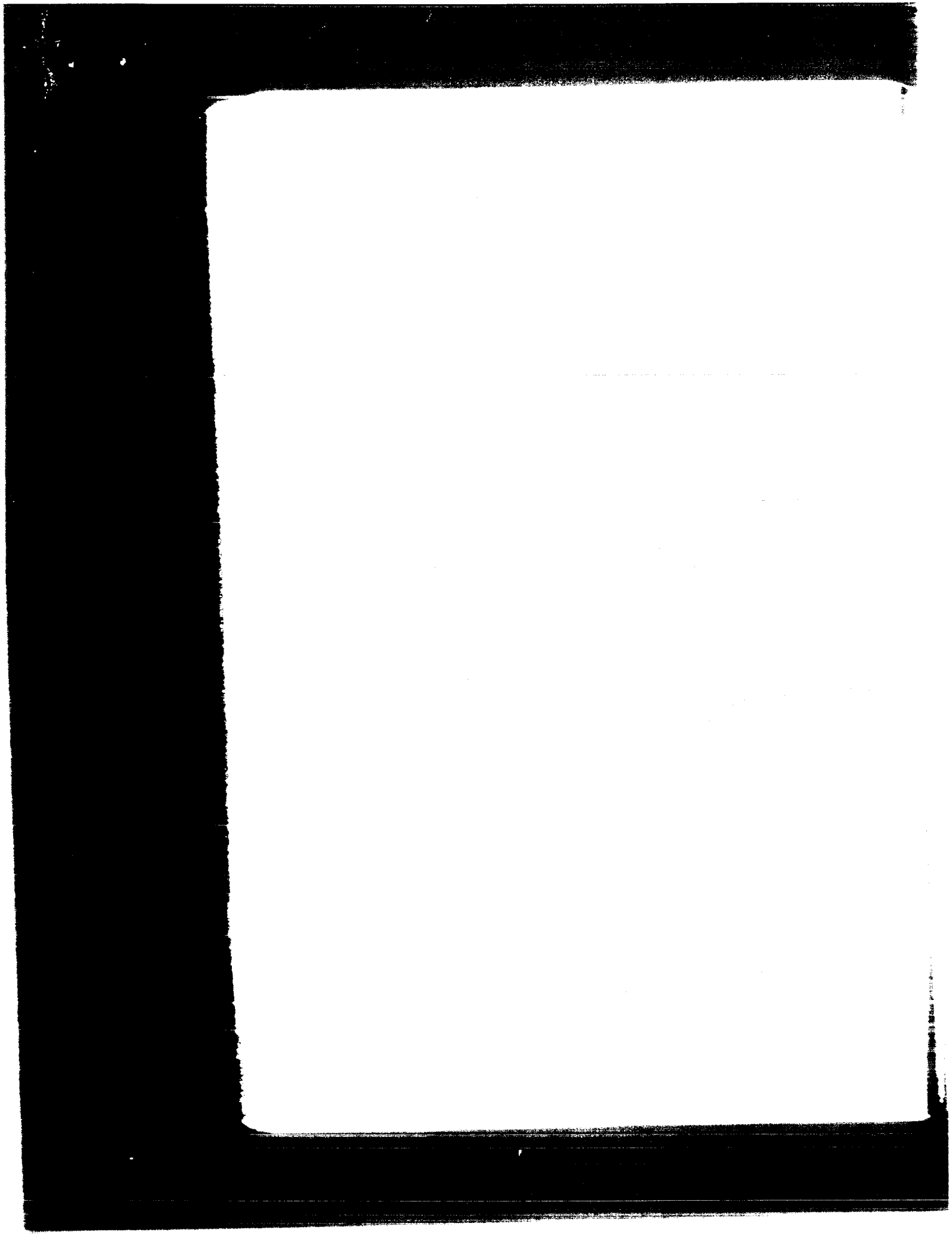
Compiler's Comments
1993 Amendment: Chapter 407 throughout section substituted "disability" for "handicap".

Cross-References
Aid prohibited to sectarian schools, Art. X, sec. 6, Mont. Const.
Nondiscrimination in education, Art. X, sec. 7, Mont. Const.
Exemption from immunization requirements on religious grounds, 20-5-405.

49-2-308. Discrimination by the state. (1) It is an unlawful discriminatory practice for the state or any of its political subdivisions:

(a) to refuse, withhold from, or deny to a person any local, state, or federal funds, services, goods, facilities, advantages, or privileges because of race, creed, religion, sex, marital status, color, age, physical or mental disability, or national origin, unless based on reasonable grounds;

(b) to publish, circulate, issue, display, post, or mail a written or printed communication, notice, or advertisement which states or implies that any local, state, or federal funds, services, goods, facilities, advantages, or privileges of the office or agency will be refused, withheld from, or denied to a person of a certain race, creed, religion, sex, marital status, color, age, physical or mental disability, or national origin or that the patronage of a



marital status, color, age, or
al disability is unwelcome or
able grounds;
a person from employment,
ation or in a term, condition,
n's political beliefs. However,
g positions on the immediate
ch provided for in Article VI,
ppointment by the governor of
for in Article VI, section 7, of
ate staff of the majority and

bitrary consideration in adop-
cerning the factors listed in

md. Sec. 2, Ch. 121, L. 1975; amd.
R.C.M. 1947, 64-306(6); amd. Sec. 3,

k-study program, 20-25-707.
rary services for the handicapped,
3.
gious beliefs of witness not relevant to
ity, Rule 610, M.R.Ev. (see Title 26, ch.

rital status irrelevant to parent-child
ship, 40-6-103.
option policy — best interest of child
rd — factors to be considered, 40-8-114.
ht to refuse to participate in steriliza-
tle 50, ch. 5, part 5.
emption from prenatal blood tests on
s grounds, 50-19-109.
ht to refuse to participate in abortion,
11.
rnishing of medical assistance,
5.
mmunity programs and homes for the
lly disabled, Title 53, ch. 19, part 1.
mmunity-based services for develop-
ly disabled, 53-20-212.
mmunity mental health centers,
206.
ligibility of handicapped for driver's
61-5-105.
mestead exemption, Title 70, ch. 32.

rviving spouse exempt from inheritance
16-313.
ceptions to fishing and hunting license
ements and regulations, Title 87, ch. 2.

e and retirement plans. (1) It
nancial institution or person to

discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments or benefits.

(2) This section does not apply to any insurance policy, plan, or coverage or to any pension or retirement plan, program, or coverage in effect prior to October 1, 1985.

(3) It is not a violation of the prohibition against marital status discrimination in this section for an employer to provide greater or additional contributions to a bona fide group insurance plan for employees with dependents than to those employees without dependents or with fewer dependents.

History: En. Secs. 1, 3, Ch. 531, L. 1983; amd. Sec. 4, Ch. 13, L. 1993.

Compiler's Comments

1993 Amendment: Chapter 13 inserted (3) to clarify that providing greater or additional contributions to a bona fide group insurance plan for employees with dependents does not constitute discrimination based on marital status; and made minor changes in style. Amendment effective February 1, 1993.

Cross-References

Insurance forms — discriminatory provisions as grounds for disapproval, 33-1-502.

49-2-310. Maternity leave — unlawful acts of employers. It shall be unlawful for an employer or his agent to:

(1) terminate a woman's employment because of her pregnancy;

(2) refuse to grant to the employee a reasonable leave of absence for such pregnancy;

(3) deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer, provided that the employer may require disability as a result of pregnancy to be verified by medical certification that the employee is not able to perform her employment duties; or

(4) require that an employee take a mandatory maternity leave for an unreasonable length of time.

History: En. 41-2602 by Sec. 2, Ch. 320, L. 1975; R.C.M. 1947, 41-2602(1); amd. Sec. 1, Ch. 285, L. 1983; MCA 1981, 39-7-203; redes. 49-2-310 by Sec. 2, Ch. 285, L. 1983.

49-2-311. Reinstatement to job following pregnancy-related leave of absence. Upon signifying her intent to return at the end of her leave of absence, such employee shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other service credits unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

History: En. 41-2602 by Sec. 2, Ch. 320, L. 1975; R.C.M. 1947, 41-2602(2); MCA 1981, 39-7-204; redes. 49-2-311 by Sec. 2, Ch. 285, L. 1983.

Part 4
Exceptions to Prohibitions

49-2-401. Repealed. Sec. 11, Ch. 801, L. 1991.

History: En. 64-306.1 by Sec. 4, Ch. 524, L. 1975; amd. Sec. 1, Ch. 27, L. 1977; R.C.M. 1947, 64-306.1(1); amd. Sec. 7, Ch. 177, L. 1979.

49-2-402. "Reasonable" to be strictly construed. Any grounds urged as a "reasonable" basis for an exemption under any section of this chapter shall be strictly construed.

History: En. 64-306 by Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; R.C.M. 1947, 64-306(10).

49-2-403. Specific limits on justification. (1) Except as permitted in 49-2-303(3) through (5) and 49-3-201(5), sex, marital status, age, physical or mental disability, race, creed, religion, color, or national origin may not comprise justification for discrimination except for the legally demonstrable purpose of correcting a previous discriminatory practice.

(2) Age or mental disability may represent a legitimate discriminatory criterion in credit transactions only as it relates to a person's capacity to make or be bound by contracts or other obligations.

History: En. 64-307 by Sec. 3, Ch. 283, L. 1974; amd. Sec. 3, Ch. 121, L. 1975; amd. Sec. 5, Ch. 524, L. 1975; amd. Sec. 8, Ch. 38, L. 1977; R.C.M. 1947, 64-307(1), (2); amd. Sec. 2, Ch. 342, L. 1985; amd. Sec. 4, Ch. 506, L. 1991; amd. Sec. 5, Ch. 13, L. 1993; amd. Sec. 9, Ch. 407, L. 1993.

Compiler's Comments

1993 Amendments: Chapter 13 near beginning revised subsection reference to include 49-2-303(5). Amendment effective February 1, 1993.

Chapter 407 throughout section substituted "disability" for "handicap".

Cross-References

Power to contract, Title 28, ch. 2, part 2.

Minors' power to contract, Title 41, ch. 1, part 3.

49-2-404. Distinctions permitted for modesty or privacy. Separate lavatory, bathing, or dressing facilities based on the distinction of sex may be maintained for the purpose of modesty or privacy.

History: En. 64-307 by Sec. 3, Ch. 283, L. 1974; amd. Sec. 3, Ch. 121, L. 1975; amd. Sec. 5, Ch. 524, L. 1975; amd. Sec. 8, Ch. 38, L. 1977; R.C.M. 1947, 64-307(3).

Cross-References

Right of privacy, Art. II, sec. 10, Mont. Const.

49-2-405. Veterans' and handicapped persons' employment preference. The application of an employment preference as provided for in Title 39, chapter 29 or 30, and 10-2-402 by a public employer as defined in 39-29-101 and 39-30-103 may not be construed to constitute a violation of this chapter.

History: En. Sec. 12, Ch. 1, Sp. L. 1983; amd. Sec. 15, Ch. 646, L. 1989.

Part 5
Enforcement by Commission

49-2-501. Filing complaints. (1) A complaint may be filed by or on behalf of any person claiming to be aggrieved by any discriminatory practice prohibited by this chapter. The complaint must be in the form of a written, verified complaint stating the name and address of the person, educational institution, financial institution, or governmental entity or agency alleged to have engaged in the discriminatory practice and the particulars of the alleged discriminatory practice. The commission staff may file a complaint in like manner when a discriminatory practice comes to its attention.

onstrued. Any grounds urged
ler any section of this chapter

amd. Sec. 2, Ch. 121, L. 1975; amd.
R.C.M. 1947, 64-306(10).

ion. (1) Except as permitted in
marital status, age, physical or
r, or national origin may not
pt for the legally demonstrable
ry practice.
ent a legitimate discriminatory
es to a person's capacity to make

amd. Sec. 3, Ch. 121, L. 1975; amd.
R.C.M. 1947, 64-307(1), (2); amd. Sec.
d. Sec. 5, Ch. 13, L. 1993; amd. Sec. 9,

hapter 407 throughout section sub-
ed "disability" for "handicap".

-References
ower to contract, Title 28, ch. 2, part 2.
linors' power to contract, Title 41, ch. 1,
).

modesty or privacy. Separate
on the distinction of sex may be
ivacy.
t; amd. Sec. 3, Ch. 121, L. 1975; amd.
R.C.M. 1947, 64-307(3).

ped persons' employment
ent preference as provided for in
a public employer as defined in
ed to constitute a violation of this

ec. 15, Ch. 646, L. 1989.

mmission

mplaint may be filed by or on
d by any discriminatory practice
nust be in the form of a written,
dress of the person, educational
ental entity or agency alleged to
and the particulars of the alleged
taff may file a complaint in like
es to its attention.

(2) (a) Except as provided in 49-2-510 and subsection (2)(b) of this section, a complaint under this chapter must be filed with the commission within 180 days after the alleged unlawful discriminatory practice occurred or was discovered.

(b) If the complainant has initiated efforts to resolve the dispute underlying the complaint by filing a grievance in accordance with any grievance procedure established by a collective bargaining agreement, contract, or written rule or policy, the complaint may be filed within 180 days after the conclusion of the grievance procedure if the grievance procedure concludes within 120 days after the alleged unlawful discriminatory practice occurred or was discovered. If the grievance procedure does not conclude within 120 days, the complaint must be filed within 300 days after the alleged unlawful discriminatory practice occurred or was discovered.

(c) Any complaint not filed within the times set forth herein may not be considered by the commission.

History: En. 64-308 by Sec. 5, Ch. 283, L. 1974; amd. Sec. 6, Ch. 524, L. 1975; R.C.M. 1947, 64-308(1); amd. Sec. 8, Ch. 177, L. 1979; amd. Sec. 1, Ch. 415, L. 1987; amd. Sec. 3, Ch. 801, L. 1991.

49-2-502. Notification of and action by commission. The staff shall notify the commission in writing of all complaints filed with the commission. The commission shall meet a minimum of four times a year to hear and act upon all complaints filed.

History: En. 64-308 by Sec. 5, Ch. 283, L. 1974; amd. Sec. 6, Ch. 524, L. 1975; R.C.M. 1947, 64-308(part).

49-2-503. Temporary relief by court order. At any time after a complaint is filed under this chapter, a district court may, upon the application of the commission or the complainant, enter a preliminary injunction against a respondent in the case. The procedure for granting the order is as provided by statute for preliminary injunctions in civil actions.

History: En. 64-308 by Sec. 5, Ch. 283, L. 1974; amd. Sec. 6, Ch. 524, L. 1975; R.C.M. 1947, 64-308(3); amd. Sec. 4, Ch. 801, L. 1991.

Cross-References
Injunctions, Title 27, ch. 19.

49-2-504. Informal settlement. The commission staff shall informally investigate the matters set out in a filed complaint promptly and impartially. If the staff determines that the allegations are supported by substantial evidence, it shall immediately try to eliminate the discriminatory practice by conference, conciliation, and persuasion.

History: En. 64-308 by Sec. 5, Ch. 283, L. 1974; amd. Sec. 6, Ch. 524, L. 1975; R.C.M. 1947, 64-308(4).

49-2-505. Contested case hearing. (1) If the informal efforts to eliminate the alleged discrimination are unsuccessful, the staff shall inform the commission of the failure and the commission shall cause written notice to be served, together with a copy of the complaint, requiring the person, educational institution, financial institution, or governmental entity or agency charged in the complaint to answer the allegations of the complaint at a hearing before the commission.

(2) The hearing must be held by the commission in the county where the unlawful conduct is alleged to have occurred unless the person, institution,